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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE, Plaintiff and Respondent, v. JAMES SCOTT, Defendant and Appellant.	D040915 (Super. Ct. No. SCD167507)

APPEAL from a judgment of the Superior Court of San Diego County, Howard W. Shore, Judge. Affirmed.

After the court denied a motion to suppress evidence (Pen. Code, § 1538.5), James Scott entered guilty pleas to possessing cocaine base (Health & Saf. Code, § 11350, subd. (a)), and vandalism (Pen. Code, § 594, subds. (a), (b)(2)(A)). The court suspended imposition of sentence and placed him on three years' probation, including a condition he serve 126 days in custody. Scott contends the trial court erred in denying his motion to suppress evidence.

FACTS

On May 17, 2002, San Diego Police Sergeant John Rivera responded to a radio call that an off-duty officer saw a man waving a machete, possibly a danger to himself or to others. (Welf. & Inst. Code, § 5150.) At a nearby gas station, Rivera saw Scott who matched the description of the suspect. The man appeared to be bothering a customer who was trying to pump gas. Seeing a machete handle sticking out of Scott's backpack, Rivera pulled his weapon and ordered Scott to lie on the ground. Within 20 to 30 seconds, Officers Steven Dickenson and Kevin Wadhams, a trainee, arrived. Scott was on the ground and the machete had been removed from his backpack. Officer Wadhams handcuffed Scott while Dickenson went to speak with Rivera. Within 30 seconds, Wadhams searched Scott after noticing what appeared to be a syringe in his pocket. He removed the object and saw it had no needle. Scott said the plunger was used to prime a work instrument. Wadhams continued the search and found a rock-like substance that appeared to be rock cocaine in Scott's coin pocket. Wadhams placed Scott in the patrol car, but Scott broke the window and escaped. He was apprehended within a few blocks and arrested.

Dickinson testified that had Wadhams not found the rock cocaine, Dickenson would have run a computer check for outstanding warrants on Scott. This would have taken no longer than a few minutes. A later computer check revealed an outstanding bench warrant in Scott's name.

DISCUSSION

The trial court found that when Rivera initially confronted Scott at the gas station and ordered him to the ground, this was a lawful detention, not an arrest. It also found that although Wadhams violated the Fourth Amendment when he searched Scott's pocket, application of the exclusionary rule was inappropriate because discovery of the contraband was inevitable, notwithstanding the unlawful search.

Scott argues the trial court erred in finding Rivera merely detained and did not arrest him. We disagree.

"The standard of appellate review of a trial court's ruling on a motion to suppress is well established. We defer to the trial court's factual findings, express or implied, where supported by substantial evidence. In determining whether, on the facts so found, the search or seizure was reasonable under the Fourth Amendment, we exercise our independent judgment." (*People v. Glaser* (1995) 11 Cal.4th 354, 362.)

There are three categories of police contacts with citizens; the consensual encounter, which results in no restraint on liberty and for which the police officer need no objective justification; the detention, a seizure "strictly limited in duration, scope and purpose"; and the arrest, the most intrusive contact, for which the officer must have probable cause. (*Wilson v. Superior Court* (1983) 34 Cal.3d 777, 784.) Circumstances short of probable cause to arrest allow a police officer to stop and detain a person briefly for questioning and limited investigation. (*In re Tony C.* (1978) 21 Cal.3d 888, 892.)

Scott argues that when Rivera forced him to the ground at gunpoint, the officer arrested rather than detained him. A police officer may detain an individual when he is

"able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant the intrusion." (*Terry v. Ohio* (1968) 392 U.S. l, 21.) The specific and articulable facts must be such as to cause a reasonable police officer in a like position, drawing on his training and experience, to believe activity relating to crime has taken place, is occurring or is about to occur, and the person he intends to detain is involved in that activity. (*In re Tony C., supra,* 21 Cal.3d at p. 893.) Here, Officer Rivera approached Scott and stopped him because he had information Scott was waving a machete, representing a danger to himself or others. Scott had access to a weapon and Rivera, who was alone, feared for his safety. The officer pointed his gun at Scott and ordered him to lie on the ground as a safety precaution, thus preventing Scott's access to the weapon. He was detained for no more than a minute or two before being arrested for possessing a controlled substance. These are sufficient articulable facts to support the detention and duration.[1]

Scott asserts that when he was forced to the ground at gunpoint and handcuffed by Officer Wadhams while still on the ground, the officers made a de facto arrest without probable cause. In *People v. Campbell* (1981) 118 Cal.App.3d 588, 596-597, the reviewing court found a defendant had been arrested when, in the course of a drug surveillance, officers approached him in an airport with guns drawn, handcuffed him and

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1 The People argue that the officers had probable cause to arrest Scott for carrying a concealed weapon (Pen. Code, § 12020, subd. (a)(4)), and assault with a deadly weapon (Pen. Code, § 245, subd. (a)(1)). Since this claim was not made in the trial court, it cannot be made for the first time on appeal. (See *People v. Williams* (1999) 20 Cal.4th 119, 136.)

removed him to another part of the airport. By contrast, in *In re Carlos M.* (1990) 220 Cal.App.3d 372, 384-385, we held a minor was not arrested when detained near a crime scene, handcuffed and transported to a hospital for an in-field lineup. We noted each case must be decided on its own facts to determine whether police used the least intrusive means available during investigation of a crime. We concluded a temporary use of handcuffs, for safety purposes, did not exceed the restraint necessary to accomplish, reasonably quickly, the purpose of the detention and was not a de facto arrest without probable cause. (See also *People v. Bowen* (1987) 195 Cal.App.3d 269, 272-273.)

Whether a detention is converted to an arrest by an officer's unnecessarily intrusive treatment of a suspect, such as unnecessarily handcuffing him, depends on practical considerations of everyday life. (*People v. Johnson* (1991) 231 Cal.App.3d 1, 13 [even a complete restriction of liberty, if brief and not excessive under the circumstance, may constitute a valid *Terry* stop and not an arrest]; see also *United States v. Robertson* (9th Cir. 1987) 833 F.2d 777, 781.) Here, Officer Rivera testified that he detained Scott in response to a report Scott was waving a machete and was a possible danger to others. Rivera testified that he had Scott lie on the ground at gunpoint because Scott had access to a weapon and Rivera feared for his own safety. Substantial evidence supports the trial court's determination that Rivera used the least intrusive means available during investigation of a crime. Having Scott lie on the ground and temporarily using handcuffs, for safety purposes, did not exceed the restraint necessary to accomplish reasonably quickly the purpose of the detention and was not a de facto arrest without probable cause.

However, Officer Wadhams exceeded the permissible scope of the detention when he examined Scott's pocket for drugs. The question becomes whether the trial court erred in refusing to exclude the drugs on the ground that their discovery was inevitable had Wadhams not searched Scott.

In *Nix v. Williams* (1984) 467 U.S. 431, the Supreme Court held that although evidence was discovered as a result of unlawful police conduct, it should not be excluded if it would have been inevitably discovered through lawful conduct. In *Nix*, officers arrested Williams on suspicion of murdering a child. While he was being transported to jail, an officer unlawfully obtained statements from him that led to the discovery of the child's body. At the time, a massive search was underway in the area where the body was located, which would have inevitably led to discovery of the body absent Williams's statements. The Supreme Court excluded Williams's statements but admitted evidence the body was found. Here, citing *People v. Superior Court (Tunch)* (1978) 80 Cal.App.3d 665, the trial court found discovery of the cocaine in Scott's pocket was inevitable because there was a reasonable possibility it would have been discovered because Scott identified himself; Officer Dickinson testified he would have run a warrant check had Wadhams not found the cocaine in Scott's pocket, and a warrant check would have disclosed an outstanding bench warrant leading to a lawful arrest of Scott.

Citing *People v. Superior Court (Tunch), supra,* 80 Cal.App.3d at page 681, and *Brown v. Illinois* (1975) 422 U.S. 590, 604, Scott argues that the principle of inevitable discovery does not apply here because the trial court did not analyze the nature of the police misconduct and the deterrent effect of the exclusionary rule. However, the record

here does not support the claim. As discussed, *ante*, Officer Rivera properly ordered Scott to lie on the ground while he removed the machete from his backpack. Likewise, it was proper to move Scott to the police car while the police assessed the situation and ran a warrant check. This was not flagrant misconduct and does not indicate bad faith. The trial court expressed consideration to the deterrent effect of the exclusionary rule when it said, "Now, there are a lot of factors that apply in order to avoid using the [inevitable discovery] rule in a heavy-handed way and that would subvert the safeguards of the exclusionary rule." The trial court did not err in finding the cocaine in Scott's pocket would have been inevitably discovered and in refusing to exclude the evidence.

DISPOSITION

The judgment is affirmed.

HALLER, J.

WE CONCUR:

McCONNELL, P. J.

BENKE, J.